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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1971

No.

OTTO HILLEN, *Petitioner*

VS.

DIRECTOR OF DEPARTMENT OF SOCIAL SERVICES AND HOUSING, *Respondent*

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR RESPONDENT DIRECTOR OF SOCIAL SERVICES AND HOUSING OF THE STATE OF HAWAII

OPINION BELOW

The sua sponte opinion of the Ninth Circuit Court of Appeals is appended to the Petition for Certiorari.

JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition.

QUESTIONS PRESENTED

Whether a prisoner, being transferred pursuant to statute from one institution to another is entitled to a hearing before such transfer.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The United States Constitution, Amendment 14, provides in part:

> ". . . nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Hawaii Revised Statutes, Chapter 355 Western Interstate Corrections Compact, Article 4 (a):

> "Whenever the duly constituted judicial or administration authorities in a state party to this compact, and which has entered into a contract pursuant to Article 3, shall decide that confinement in, or transfer of an inmate to, an institution within the territory of another party state is necessary in order to provide adequate quarters and or is desirable in order to provide an appropriate program of rehabilitation or treatment, said officials may direct that the confinement be within an institution within the territory of said other party state, the receiving state to act in that regard solely as agent for the sending state."

STATEMENT OF THE CASE

Respondent agrees that the Petitioner was transferred from Oahu Prison in the State of Hawaii to Folsom Prison in California pursuant to statute. Respondent is without knowledge as to the details of the treatment the prisoner has received since his transfer. Respondent denies that Petitioner was transferred against his will and denies all the other allegations in Petitioner's statement of the case.

ARGUMENT

The authority to transfer prisoners from one institution to another rests with the state correction officials.

This principle appears in the statute under which petitioner was transferred, the Interstate Corrections Compact. The Model Penal Code Section 304.1.6 also suggests this principle: "The Director of Correction may at any time order a prisoner transferred . . . to another institution . . ."

Through the years, courts have supported this authority. In *Chapman v. Scott,* 10 F.2d 156 at 159 (1925), the Court ridiculed prisoner Chapman's protest against a transfer: "The relator did not become invested with a tenancy for years of a cell in the Atlanta penitentiary by the commission of a felony and the sentence of a federal court following his conviction of that felony."

Courts have been reluctant to find transfers sufficiently arbitrary and capricious as to violate the due process clause of the 14th Amendment.

In 1967, in a 10th Circuit case, an inmate of the U. S. Penitentiary of Leavenworth, Kansas, Donald Lawrence brought a habeas corpus action to compel his return to a federal correctional institution in Texas. The 10th Circuit Court of Appeals in *Lawrence v. Willingham,* 373 F.2d 731, 732 (1967) pointed out that in regard to the transfer of a prisoner, "the decision of the Attorney General is conclusive in the absence of a showing of abuse of discretion, that is, that the transfer was arbitrary or capricious." The Court went on to find that the transfer in this case, from Texas to Kansas, had not been arbitrary or capriciously made.

In *Rodriguez-Sandoval v. U. S.,* 409 F.2d 529, 532 (1969), the First Circuit agreed with the 10th Circuit in *Lawrence* in finding that the transfer of a Puerto Rican prisoner from Puerto Rico to Atlanta was not arbitrary or capricious even though only a handful of such prisoners were so transferred and the transfer effectively cut off most ties between the prisoner and his community.

Statutes concerning the transfer of prisoners, such as Hawaii Revised Statutes, Chapter 355, in the instant case, are presumed to be constitutionally valid, and authorities are not required under the 14th Amendment's due process clause to provide a hearing to a prisoner prior to his transfer.

This principle was well illustrated in *Duncan v. Madigan,* 278 F.2d 695 (1963), where a prisoner, transferred from a Maine institution to Alcatraz

brought a habeas corpus action challenging the validity of his transfer on several grounds, one of which was that he was not provided a hearing prior to his transfer and this fact constituted a violation of due process. The Court dismissed this allegation in one sentence: "Additional contentions by the appellant that he was entitled to be heard with respect to his place of custody, and that his transfer denied him equal protection of the law are without basis and have no merit." Ibid. pp. 656-657.

Petitioner's allegation that a summary dismissal of his case is inconsistent with the per curiam decision in Haines v. Kerner, 404 U.S. 519 (1972) has no merit.

Respondent suggests that the parallel proposed is inapposite. The *Haines* case concerned a claim for pecuniary damages by a prisoner against the Governor of Illinois and others for physical injuries suffered while in prison.

Petitioner in the instant case alleges no physical injuries, and prays for no money damages. Respondent urges that merely because a prisoner has a right not to be injured, he does not have a right to name the place in which he is to be imprisoned.

The administration of prisons is an executive function into which the judicial branch ordinarily will not intervene.

This "hands-off doctrine" has been followed because: (1) the administration of prisons is an executive and not a legal function and (2) prison authorities must be given wide discretion in the implementation of rehabilitation. 21 Buffalo Law Review, 554 (1972), 60

Georgetown Law Journal 230 (1971). Under Hawaii law, the scope of judicial review of administrative actions such as the transfer of a prisoner is limited to ascertaining whether there is a warrant in the law in fact for what an agency has done and unless there is prejudicial departure from the requirements of the law or abuse of the agency's discretion, the reviewing Court is without authority to intervent. *H C & D Moving & Storage Co. v. U. S.*, 298 F.Supp. 746 (D.C. 1968). Respondent respectfully prays that the reviewing Court should adopt this standard.

CONCLUSION

For the reasons set forth above, it is respectfully submitted that this Petition for a Writ of Certiorari should be denied.

Dated, Honolulu, Hawaii,
October 6, 1972.

Respectfully submitted,

GEORGE PAI,
Attorney General, State of Hawaii,
OLEN E. LEONARD, JR.,
Deputy Attorney General,
By JAMES E. ROSS,
Deputy Attorney General,
Attorneys for Respondent.